IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 274.

THE SUPREME TRIBE OF BEN-HUR,
Appellant,

v.

AURELIA CAUBLE ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

PETITION FOR REHEARING.

WILLIAM C. BACHELDER,
Attorney for Appellees.

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Now comes Aurelia J. Cauble, Martha M. Brown, Helen B. Burroughs, O'Neal Watson, Harry M. Vance, Robert McMains, Eliza H. Watson, Sidney Speed, William E. White, Lavander C. White, Ida M. Williams, John O. Williams, William H. Williams, John H. Rice, Theodore M. Sharp, Robert T. Davis, George Neilist, Margaret C. McMains, John W. Hurley, Henry T. Schenck, Thomas J. Houlihan, Frank S. VanDyke, George C. Cox, Armina J. Cox, Elizabeth Clemson, Margaret Speed, Thomas J. Harp, Mary E. Osburn, Edwin A. Brown, James Walter Grimes, Vona Dickerson, John C. Wingate, Anna E. Young, Wesley

W. Young, James W. Dickerson, appellees, and hereby petition the court to set aside the judgment heretofore granted in this case and to grant a rehearing, and in support of this petition say:

1. The opinion of the court is based upon the faulty premise that in this case there was the requisite diversity of citizenship to give the Federal court jurisdiction of this case. This holding is in direct contravention of the rules for determining jurisdiction as laid down in the case of *Strawbridge v. Curtiss*, 3 Cranch 267, and upheld in the following cases:

Florida Cent. & Pen. R. R. Co. v. Bell, 176 U. S. 321, p. 332.
Hooie v. Jameson, 166 U. S. 395.
Barney v. Baltimore, 6 Wall. 280.
New Orleans v. Winter, 1 Wheat 91.
Merchants, etc., Co. v. Insurance Co., 151 U. S. 368, 384.
Hamrick v. Hamrick, 153 U. S. 192.
Shields v. Barrow, 17 How. 130.
Cameron v. McRoberts, 2 Wheat 571.

In *Smith v. Lyon*, 133 U. S. 315, a later case than that of *Stewart v. Dunham*, cited by the court, it was held that the rule laid down in *Strawbridge v. Curtiss* had never been changed.

The rule in *Strawbridge v. Curtiss* is that in determining diversity of citizenship each of the plaintiffs must be capable of suing each of the defendants. In this case the plaintiffs were all of the members of Class A. These appellees are members of Class A and were residents of the

same state as the appellant, defendant in the original case. Therefore, under the rule laid down in *Strawbridge v. Curtiss*, the Federal court did not have jurisdiction of a suit between all of the members of Class A and the Supreme Tribe of Ben-Hur. It could only acquire jurisdiction of the case as between the defendant and those plaintiffs who were non-residents of the State of Indiana.

2. This case is based upon the faulty premise that Rule 38 in Equity gave the Federal court jurisdiction of all class suits. There is nothing in that rule that in any way makes the rules of jurisdiction any different in class suits than in other suits. To attain jurisdiction, the complaint must show that every member of the class is a non-resident of the State of Indiana or else there is not diversity of citizenship.

Cameron v. McRoberts, 2 Wheat 571.
Vattier v. Hinde, 7 Peters 252.

At the time this last case was decided class suits were as fully recognized and permitted as they are now.

Beatty v. Kurtz, 2 Peters 566.

3. The opinion of the court is based upon the authority of *Stewart v. Dunham*, 115 U. S. 61, when in fact *Stewart v. Dunham* is not in point for the following reasons:

A. There are three classes of parties to a bill in equity:

1. Formal parties.

2. Persons having an interest in the controversy, and who ought to be made parties, in

order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These parties are commonly termed necessary parties; but if their interests are separable from those of parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other parties not before the court, the latter are not indispensable parties.

3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Shields v. Barrow, 17 How. 130.

This first class may be dispensed with. The second class has been decided along a different rule of law than the third class.

Cameron v. McRoberts, supra.
Osborn v. Bank of U. S., 9 Wheat 738.
Harding v. Handy, 11 Wheat 132.
Mallow v. Hinde, 12 Wheat 197.

That the case now before the court belongs to the third class can not be questioned. That the case of *Stewart v. Dunham* belongs to the second class is clearly evidenced

from the facts that in it the judgment was a separate money judgment in favor of each party and that the Supreme Court dismissed the appeal against all but the original creditor, and proceeded to decide his claim against him.

The cases cited above have held that in the absence of diversity of citizenship the court may in some instances attain jurisdiction over the second class, but never over the third class.

Shields v. Barrow, supra.

B. *Stewart v. Dunham* is not in point in this case for the further reason that it was removed from the state court and the Federal court attained jurisdiction of the cause by reason of the Removal Act of 1875, as construed in the case of *Barney v. Latham*, 103 U. S. 205, wherein it was held that under authority of that act a case in which there was a separable controversy between parties of diverse citizenship could be removed as a whole, though there were other parties in the case whose citizenship was not diverse. In other words, Dunham's claim against Stewart was a separate controversy in which the other creditors were not interested, which fact was shown by the fact that the other creditors won while Dunham lost. Therefore, under the Removal Act the Federal court could assume jurisdiction of the entire case and incidentally decide the rights of the other parties.

The Ben-Hur case was originally in the Federal court and is in no way governed by the Removal Act of 1875.

C. *Stewart v. Dunham* is not in point because Equity Rule 39 does not apply to it. Equity Rule 39 says that the decree shall be without prejudice to absent parties. In *Stewart v. Dunham* all the parties were in court voluntarily before the decree was made, while in this case these appellees were not in court at all.

4. The opinion of the court is based upon the faulty premise that the subject matter of this suit was one over which the Federal court has jurisdiction. Appellees call the court's attention to the fact that the issues in *Balme et al. v. Supreme Tribe of Ben-Hur* did not contain a Federal question, but were purely within the jurisdiction of the courts of the State of Indiana, and the only way in which the Federal court could attain jurisdiction was by reason of the fact that all the plaintiffs were residents of different states from the defendant, who was a resident of the State of Indiana.

5. The opinion of the court erroneously held that Equity Rule 39 does not apply to a subject already covered by Rule 38. Appellees insist that Rule 38 does not in any way touch upon the question of the jurisdiction of the court or the effect of its decree on absent parties. It merely states in a rule of court the already well established rule of law which permits class suits, but it did not confer jurisdiction of any class suits over which the Federal court did not already have jurisdiction. Under this rule a suit brought on behalf of a class would have to show facts giving the court jurisdiction, the same as formerly, and it would be the duty of the court to follow the rule quoted in the case

of *King Iron Bridge Co. v. Ottoe County*, 120 U. S. 226, as follows:

> "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction and in the exercise of its appellate power, that of all other courts of the United States, where such jurisdiction does not affirmatively appear in the record on which, in the exercise of its power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes."

Under Rule 38 and in the absence of Rule 39, the Federal court would have been forced to dismiss the suit of *Balme et al.*, because the record did not disclose that all the members of Class A were non-residents of the State of Indiana. But it is Rule 39 which allows the court to use its discretion and retain jurisdiction and enter up a decree which shall not bind the absent parties. Those two rules are not in conflict, nor is Rule 38 an exception to the Rule 39. Rule 38 as amended was not intended to apply to such cases. On the other hand, the provision that was taken away from Rule 38 was made a separate rule, Rule 39, was broadened to affect not only class suits, but "all cases." The two rules were created simultaneously and by the same court. If Rule 39 had not been intended to include class suits, it would not have inserted the words "all cases." There is nothing about a class suit which makes it an exception to the rules which are laid down by the court and by statutes to insure constitutional right of every citizen

to "due process of law." On the contrary, it should be more carefully scrutinized than any other kind of action, because in it the property rights of persons may be adjudicated without those persons' knowledge and without giving them any opportunity to be heard in court.

6. The court in its opinion erroneously calls into question the inconvenience which may be caused by a decree which binds some of the class and does not bind others. Let us on the other hand consider the inconvenience which may be caused to those persons whom the court would bind in a case wherein they had not opportunity to be heard and protect their rights. Those who were in court had their opportunity, and if they are bound, it is no more than fair. But these appellees were not in court, had no notice, no opportunity to be heard, and could not have prosecuted this action because the court was without jurisdiction as to them. The court below must have decided that it would not be much inconvenience to the defendant because it could have dismissed the cause for want of jurisdiction, but it used its discretion as permitted in Rule 39 in Equity and proceeded to decide the case without prejudice to absent parties. Evidently the defendant did not feel very seriously inconvenienced because it did not object to the jurisdiction of the court and allege the fact that part of the plaintiffs were residents of the State of Indiana.

7. Coming finally to a consideration of this case purely from a reasonable and logical viewpoint apart from the tangled maze of decisions and rules, appellees call the court's attention to the following facts: If the appellees had instituted the original bill against the Supreme Tribe of Ben-Hur in the Federal court on behalf of themselves and all

other members of Class A, it would have immediately been dismissed for want of jurisdiction in spite of Equity Rule 38. If the appellees had instituted the suit in the state court and *Balme et al.* had joined in and then the Supreme Tribe of Ben-Hur had asked to remove the case to the Federal court, its petition would not have been granted, because the case did not contain a separable controversy in which there was diversity of citizenship. On the other hand in the case of *Stewart v. Dunham* if the other creditors had filed their case against Stewart in the state court and Dunham had afterwards joined, Stewart could have had the case removed to the Federal court, because it contained a separable controversy between him and Dunham and the entire case would have gone to the Federal court.

Thus the difference between the two cases becomes plain. It is clear to see why the court has jurisdiction in one case and not in the other.

If the appellees in this case had had actual notice of the case of *Balme et al.* and had sought to come in and have their rights protected, the Federal court would not have permitted them to appear and be heard, because as soon as they appeared the court would align them according to their interests, and instead of placing them as intervenors or third parties with a separate interest in the controversy, it would have been forced to align them as co-plaintiffs jointly and inseparably interested along with all the other plaintiffs and the case would have fallen under the rule laid down by Chief Justice John Marshall in *Strawbridge v. Curtiss*, 3 Cranch 267, and the court would have been without jurisdiction, and it is inconceivable that they should be bound by the decree when they did not have the right to

appear and be heard. The court did not have jurisdiction of the res unless it had jurisdiction of the parties, and it did not have jurisdiction of the parties unless it had jurisdiction of Class A, and it did not have jurisdiction of Class A if some of the members of Class A were citizens of the same state as the defendant; therefore, it must be decided that Class A in this suit did not include its Indiana members, or else the Federal court never had jurisdiction of the case of *Balme v. Ben-Hur* and its decree was wholly void.

That *Stewart v. Dunham* is an exception to the rule and not in line with this case is clearly shown in the following decision of this court:

> "If the right of the plaintiffs is based upon a common ground and they elect to make it a common controversy, it is a single cause of action and the rule in *Strawbridge v. Curtiss* applies. This rule has been applied to removal cases except where there is a separable controversy."
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> *Peninsular Iron Co. v. Stone*, 121 U. S. 631.

It is submitted that the appellees are entitled to a hearing on the above points.

Respectfully submitted,

William E. Bachelder

Attorney for Appellees.

CERTIFICATE OF COUNSEL.

The undersigned, attorney for Aurelia J. Cauble, and others, appellees, in the above entitled cause, hereby certifies that the above Petition for Rehearing is made in good faith, and not for purpose of delay; and that in his opinion. said petition is well founded in law.

William L. Barnes,

Attorney for Appellees.